M. KARUPPANAN

v.

SYKT. GREAT ALONIONERS TRADING CORP. BHD.

HIGH COURT MALAYA, SEREMBAN
MUSTAPHA HUSSAIN J
[SUIT NO. 137 OF 1982]
22 AUGUST 1990

CONTRACT: *No formal signed contract - Tender documents - Defendant did not meet progress payments - Plaintiff unable to perform work - Breach - Damages.*

The National Union of Plantation Workers (NUPW) in pursuance of the NUPW Sugar Cane Smallholders' Scheme C (the Scheme) acquired land in KP and formed the defendant company D to carry out the project. D called for tenders and the plaintiff P was the successful tender. The parties agreed that the tender documents would form the contract; these documents provided the rates of charges for the different types of works.

P's claim for progress payments were not met regularly, D complaining of P's work. As a result D withdraw their undertaking to T to pay the instalments due from P to T; D terminated the contract with P after P had completed work on part of the land allotted to him. P sued for breach of contract; D raised various defences and counterclaimed.

The issues for determination was firstly whether there was a breach of the contract, if so, by whom, secondly how much work P had done and thirdly whether there was an item of sugar cane seedlings to be planted by P (this was not included in the tender documents which formed the contract).

Held:

[1] There was no provision in the schedule for agreed rates for the different items of work for P to plant sugar cane seedlings.

[2] (a) From the evidence before the Court it is abundantly clear that D, due to the lack of proper management, was at fault in making payments promptly and in full to P for work done by P; this had placed P in difficulty in performing his contract work.

(b) D's conduct in (a) has caused not only delay in carrying out the work under the contract but made it impossible for P to carry out the work smoothly; therefore D were the party who had breached the contract by their desultory conduct.

[Plaintiff's application allowed.]

For the plaintiff - S. Sivasubramanian; M/s. Siva, Ram & Associates
For the defendant - T Muthuvelu; M/s. Nahappan & Peri

[**Editors Note:** The defendants have lodge an appeal to the Supreme Court vide Appeal No: 02-302-90.]

JUDGMENT

Mustapha Hussain J:

The National Union of Plantation workers embarked on a grandiose scheme for its members known as the NUPW Sugar-Cane Smallholders' Scheme. It acquired a lease of about 9,000 acres of land in the Mukim of Serting Ilir, Kuala Pilah. The union formed a company known as Syarikat Great Alonioners Trading Corporation Berhad, the defendants here to carry out the project.

Sometime in April 1977 the defendants caused advertisements inviting tenders from contractors for the felling, clearing etc. of the land they had acquired in order to plant sugar cane. The plaintiff tendered for the work and his tender was successful.

Though no formal contract was signed for reasons best known to the parties, yet the parties agreed to the tender documents to form the contract, which included the rates of charges for the different types of work to be carried out as specified in the tender documents that were submitted by the plaintiff (see pp. 18 et seg of AB). On 30 July 1977 the contract was awarded to the plaintiff (AB 27). Later on new rates for the different items of work to be carried out under the contract were agreed to (see p. AB40 where it is to be noted that the item of planting sugar cane seedling did not form part of this contract).

The plaintiff started to carry out the work as set out in the tender documents and submitted claims for progress payments. Things were not moving smoothly right from the beginning the payments were not forthcoming in full and regularly. The defendants were complaining of shoddy works, delays etc. on the part of the plaintiff.

It came to a time when the defendants withdrew their undertaking to Tractors (M) Sdn. Bhd. to pay the instalments due from the plaintiff to Tractors (M) Sdn. Bhd. on 17 October 1978 (see AB66). Then followed discussions which came to naught and on 21 February 1979 the defendants terminated the contract with the plaintiff. This was when the plaintiff had carried out work which he had contracted for on 1,238 acres of land out of the 3,000 acres allotted to him. The plaintiff then filed this suit claiming:

(1) general damages for breach of contract;

(2) RM115,472.85 being the balance due for the work done; and

(3) interests and costs.

In their defence, the defendants stated that the lease of the land to the defendants was only 4,935 acres and not 9,000 acres. The items of the work were also disputed. The defendants alleged shortcomings in the work carried out by the plaintiff. The defendants also alleged that the plaintiff **abandoned** the contract work as early as **February 1979**. The defendants also counterclaimed for losses suffered by the plaintiff's failure to deliver sugar cane and counterclaimed RM480,000 with interest. Of course the defendants denied that the plaintiff was entitled to the claim of RM115,472.85 made by him.

The issues before the Court then are:

(a) Was there a breach of the contract and if there was, who committed the breach;

(b) How much work had the plaintiff carried out?

(c) Was there an item for sugar cane seedlings to be planted by the plaintiff?

Plaintiff's first witness (PW1) a surveyor's assistant, gave evidence that **1,516 acres** had been cleared - coloured blue on AB85. Area coloured red was not cleared and area coloured green of 74 acres was the area felled but not cleared. In this 1,516 acres was included the swamp area. The plaintiff is claiming that he had worked i.e. cleared an area of **1,238 acres**.

Plaintiff's second witness (PW2) was plaintiff's son who was in charge of the work on site of the plaintiff's contract work. He testified to the effect that PW1 came to the site to do the survey and AB75 was the survey done by PW1.

Then the plaintiff himself gave evidence (PW3). The agreed rates (not disputed) for the different items of work on contract are set out on p. 40 of AB. Nowhere in the schedule of agreed rates for the different items of work is there an item that the plaintiff had to plant sugar cane seedlings. It may be that the defendants had to plant the sugar cane seedlings after the plaintiffs had cleared the land. Therefore the defendants' allegation in their counterclaim (paras. 20, 21, 22, 23 and 24) that the plaintiff had to plant sugar cane and deliver some to the defendants falls flat and with it the defendants' counterclaim for RM480,000. Thus the 3rd issue is disposed of.

Now, coming to the 1st and 2nd issues i.e. whether there was a breach of the contract and if there was, who committed the breach and how much work the plaintiff had carried out up to the time of the breach.

A standard form of contract was supplied to the plaintiff at the outset but it was never signed but both parties agreed to all its items and conditions and for all intents and purposes this standard contract had been agreed to by both parties as the contract document (p. 18 et seq. of AB). One of the conditions of this standard contract between the parties stipulated that the superintending officer (SC) will have to issue a certificate for the purpose of progress payments. Another condition sets out that the plaintiff has to deposit 5% of the total sum as security deposit before starting work. The defendants also have the right to retain 10% of the total account to be paid for work carried out by the plaintiff (retention fund).

The plaintiffs did not make the 5% security deposit, his reason being that no formal contract was signed between the parties. On the other hand the defendants' SC had not even once issued a certificate of work done for effecting progress payment.

It is also clear beyond any peradventure that whenever the plaintiff sent in his bills for payment for work done, the payments were never made in full and promptly, even taking into account the deduction of 10% retention fund. There is evidence that the plaintiff had written in asking for certificates to be issued for the purpose of receiving payments for work already carried out but there was no reply from the defendants. All the payments were either made in drips and drabs and never made promptly. So much so, the plaintiff had to surrender one bulldozer to the Tractors (M) Sdn. Bhd. as the plaintiff could not make the regular monthly payments of instalments.

The defendants' SO (DW3) in his evidence said that payments made were based not on the work carried out by the plaintiff as claimed by the plaintiff but based on his inspection and estimation of the actual work done by the plaintiff. However the defendants' SO (DW3) could not produce even a scrap of paper to show how he had arrived at the quantity of actual work carried out by the plaintiff, on which the superintending officer (DW3) had based his payments.

From the evidence before the Court it is abundantly clear that the defendants due to the lack of proper management; as they had an economics lecturer as superintending officer, a veterinary surgeon and an ex army captain supervising the project on site, and also due to their financial inability, were at fault in making payments promptly and in full due to the plaintiff for work carried out by him. This had put the plaintiff in difficulty in performing his contract work of felling and clearing the land, but still carried on even after the plaintiff had to surrender one of his tractors due to lack of adequate funds to pay the monthly instalments as the plaintiff was not getting the full payment from the defendants.

The defendants' conduct in not paying the plaintiff for work done, promptly and in full (even after deductions) had caused not only delay in carrying out the work under the contract but made it impossible for the plaintiff to carry out the work smoothly. Again, it was the defendants who had "commanded" the plaintiff to cease all further operations under the contract. It is the finding of fact by this Court that the defendants were the party who had breached the contract by their desultory conduct.

It is quite obvious that due to the defendants' shoddy manner of making payments, refusal and even not replying to plaintiff's written requests for certificates to be issued for progress payments and finally the defendants "commanding" the plaintiff not to resume work (p. 74 of AB), all these made it abundantly clear that the breach of contract was committed by the defendants.

Since the 5% security deposit and the 10% retention fund have to be returned to the plaintiff after the expiry of the defects liability period, these should not be deducted from the plaintiff's claim of RM115,472.85 being the balance of payment due to him. There shall be interest of 8% per annum to run from date of termination of the contract i.e. from *21 February 1979* (p. 74 of AB).

On the claim for general damages for breach of contract, the plaintiff was given 3,000 acres of land to be felled and cleared but the plaintiff could only manage to carry out the work on 1,238 acres leaving 1,762 acres. The rate agreed to was RM427 per acre. The usual margin of profit is 10% nett. Therefore damages shall be 10% of 1,762 acres x RM427 = *RM75,237.40* with interest at 8% per annum from 21 February 1979.

Costs to the plaintiff.

Defendants' counterclaim is dismissed.

Also found at [1991] 1 CLJ 138